[redacted]

No. 73-98

THE UNITED STATES OF AMERICA

v.

GRINNELL CORPORATION, et al.

HOLMES ELECTRIC PROTECTIVE CO.

v.

THE UNITED STATES OF AMERICA

On Appeal from the United States District Court
For the District of [redacted]

REPLY BRIEF FOR
HOLMES ELECTRIC PROTECTIVE CO.

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IN THE

Supreme Court of the United States

October Term, 1965

Nos. 73, 76

THE UNITED STATES OF AMERICA,
Appellant,

v.

GRINNELL CORPORATION, *et al.*

HOLMES ELECTRIC PROTECTIVE COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA

On Appeal from the United States District Court For the District of Rhode Island

REPLY BRIEF FOR HOLMES ELECTRIC PROTECTIVE COMPANY

ARGUMENT

POINT I

The government brief confirms that the district court committed serious error and that no finding of violation of the antitrust laws on the part of Holmes is justified.

We must point out that the government brief in no way really answers Holmes' main brief, which, on detailed analysis of the findings and the record, showed the clear absence of evidence that Holmes violated the antitrust laws (even in the commercially unreal market designated by the district court), that the market so designated was absurdly unsound and that the decree was not only unjust, but was reached in an atmosphere of haste and hostility and through new rules of law (not revealed until after the trial) that are both unwise and unwarranted.

In point of fact, the government now appears to concede or confirm much of what we said. For instance, the government concedes that barring Mr. Fleming from employment by the defendants was unjustified (Brief, pp. 38, 94). Likewise, the government concedes that the broad injunction against violating the antitrust laws in the general language of the statute is contrary to the precedents and improper (Brief, pp. 38, 95). The government brief tells us that the relief selected by the district court was "of such severity" and so "sweeping" in this regard that even the government cannot support it.

More than that, the government brief confirms—by not denying the indisputable fact (contrary to Finding 17 [R 750], one of the many erroneous findings)* that Grinnell supplied nothing to Holmes—that there was no vertical integration between Grinnell and Holmes. In the absence of any vertical connection between Grinnell and Holmes and with Holmes concededly having, even in the tortured market designated by the government, no more than 12% of the business, all reason to divest Holmes from Grinnell disappears. This divestiture decreed for Holmes—which company is only in the burglar and holdup protection business and purchases nothing from Grinnell—is just as extreme and just as uncalled for as was the prohibition against future employment of Mr. Fleming by the defendants.

Actually, as the government's brief also reveals, the government was just as non-plussed as the defendants, not

* For the other erroneous findings of fact, see Holmes' main brief, pp. 15-26.

only by the relief decreed, but also by the district court's views on liability. The government's brief, it is significant to note, does not say, as the district court did in this case, that monopolization can be decreed in the absence of a showing of power to exclude competitors or to fix prices. Nor does the government's brief say, as the district court did in this case, that once defendants are found to have a predominant position in a designated market, it is their burden to prove that their market position did not result from a violation of the antitrust laws. Nor does the government's brief say, as the district court did in this case, that the sole reason for such an unprecedented, unheralded and unwarranted shift in the burden of proof was to effect a supposed (but, as pointed out in Holmes' main brief [pp. 44-46], an unrealizable) saving "in time in needlessly proving, defendant's predatory tactics, if any, or defendant's pricing, or production, or selling, or leasing, or marketing, or financial policies while in this predominant role." (R 745-6).

The government, like defendants, apparently was not, to quote from the district court's opinion (R 745), like "most of the cognoscenti who have expected that a day would come when the Supreme Court would announce that where one or more persons acting jointly had acquired so clear a dominance in a market as to have the power to exclude competition therefrom there was a rebuttable presumption that such power had been criminally acquired and was a monopolizing punishable under §2." Nor, like defendants, is the government able to explain the contradiction between this statement by the district court (that "the power to exclude competition" is a necessary part of the test of "criminally monopolizing") with the explicit finding by the district court (Findings 45, 46; R 756)—and which is undeniably the fact—that these defendants did not have the power to exclude competition.

Nor can the government explain how it is that the defendants here, who have 87% or more of the assertedly relevant market, do not have either the power to exclude competitors from that market or to control prices in that

market. The answer, of course, as shown in Holmes' main brief and in the ADT brief, is that the market is wrongly defined—and common-sense confirms that.

Indeed, the government does not even attempt to explain how it is that the non-accredited business of the defendants (almost half of Holmes' business and over 60% of ADT's burglar alarm business [R 311]) is included in the so-called relevant market while the very same business of non-accredited competitors of Holmes or ADT is excluded. Nor does the government attempt to explain how it is that industrial process service, which cannot be accredited, is nonetheless included in the "accredited" relevant market.

Nor does it make sense for the government to combine such different businesses as burglary protection (which Holmes has offered its customers since its founding in 1858) with fire alarm and sprinkler supervisory services (which Holmes has not gone into since commencing operations over 100 years ago, long before ADT or AFA came into the picture and the first 92 years of which were totally independent of Grinnell) while, at the same time, excluding from the market proprietary central station burglary protection (which, by the government's own definition on p. 61 of its brief, is the same as central station burglary protection operated by protective companies), burglary protection by direct connection to a police station or through a 24 hour telephone answering service, various types of local alarm burglary protection systems and watchmen protection. The government's brief says that central station protection is more reliable in that it allegedly alone "automatically discloses any defect in the hazard-detecting equipment" and "guarantees that there are always trained personnel" to respond, while, the government asserts, a watchman may be asleep or drunk or policemen may not come when called to a burglary or users of other types of protection services "may not properly maintain them" (see, e.g., pp. 7, 8, 34, 50, 59). This is technically incorrect and completely overlooks the fact that proprietary central station protection (which the government leaves out of the relevant market) is the same in technique and technology

as the central station protection offered by protection companies (which the government includes in the relevant market) (GX 348, R 3025; GX 320, R 2478; GX 330, R 2721; GX 331, R 2745-6; R 366-7, 520-1). It also overlooks the fact that just as many, if not more, hazards affect central station guards in getting to the scene of a burglary than policemen summoned through a direct connection or through a telephone answering service or by the action of a local alarm.

The truth of the matter, of course, is that all burglary protection services have hazards—some of which in fact, are identical from service to service (as in the case of proprietary central stations and protection company central stations or with respect to interruption of a telephone cable or short-circuits or power failures) and others, such as central station guards (whether protective company guards or proprietary central station guards) having an accident or becoming delayed enroute, are equivalent to one another. But, in any event, no protection service is infallible and, certainly, there is no valid basis for saying, as the government brief does, that policemen, summoned by a direct connection from the protected premises to the police station or through a telephone answering service, or proprietary central station guards, will not respond to a burglar alarm as well as protection company central station guards.* Indeed, that the government is reduced to urging this is demonstrative of how far-fetched the market it designated actually is. Even local alarm protection services, we should point out, may have built-in warnings that reveal when they are inoperable. And the fact that the Holmes sales manager, as noted on page 61 of the government brief, must state that Holmes' protection was superior to non-central station protection in itself, shows that, in the field, he was facing real competition from such other protection services.

* In point of fact, municipal authorities have requested direct connected protection service to avoid the added opportunity for human error present in central station protection service. (See, *e.g.*, Exh. D 4, R 496; D 97, R 4526-7; W 38a, R 5518.)

Actually, at two points, the government brief defines the product market in these words (pp. 33, 47): "the product involved essentially is hazard protection through the means of a central warning system". Under that definition, proprietary central station protection service, direct-connected protection service and telephone answering protection service (each of which the district court excluded from the designated product market) obviously should be included in the relevant market. (GX 348, R 3025; GX 320, R 2478; GX 330, R 2721; GX 331, R 2744-6, R 366-7, 5021; GX 319, R 2419-21; GX 328, R 2597.)

Nor does the government brief justify the ignoring by the district court of the conceded overlap in insurance discounts available for the various protection services. (See Holmes' main brief, p. 30.) Holmes' bank burglary subscribers, for instance, usually receive no insurance discounts and yet are included in the relevant market, while similar financial institutions using watchmen may receive substantial insurance discounts and are not included. Likewise, Holmes' mercantile central station customers who receive a lessor discount than some local alarm users in an identical business are included in the government's relevant market, while the local alarm users are not. As the government brief specifically acknowledges (p. 52) "approximately 60 per cent of the subscribers to accredited central station burglary service do not receive the discounts."

So, too, the government brief fails to show how Holmes could be engaged in a national market or in interstate commerce where it and its subsidiaries operated in only three cities and had not a single subscriber in a different state than the central station that served it.

Nor does the government brief point to evidence rendering Holmes guilty of a conspiracy to monopolize or restrain trade. In this respect, the government can only mention that acquisitions were made by the defendants and there was an allegedly illegal agreement between ADT and Holmes entered into in 1906. But, Holmes has had no substantial history of acquisitions and, indeed, has made no acquisition in well over 30 years. And, the 1906 agree-

ment was terminated in 1947, a decade and a half before this suit was brought and while Holmes was still wholly owned by the New York Telephone Company. In other words, the agreement was cancelled three years before Grinnell acquired Holmes from the Telephone Company and, more than that, there is no evidence whatever that Grinnell even knew of the cancelled 1906 agreement.

Apparently recognizing—as did the district court—that the long-since-cancelled 1906 agreement itself was not a basis for a finding of current wrongdoing, the government urges that the limitations of the agreement continued after its termination and that this was wrongful and must be punished. But this is not so.

The government brief (footnote 29, p. 64) incorrectly states that the 1906 agreement limited Holmes "to a few cities". This is contradicted not only by the agreement (R 1312-15), but also by the statements on page 13 of the government brief. Holmes, in fact, did business in only three metropolitan areas, but it did so, not as the result of the agreement, but because of its independent business judgment, formulated without ADT's or Grinnell's involvement. The agreement restricted Holmes from going into the fire alarm business or outside of a territory that included Maryland, Delaware, the District of Columbia, New Jersey, Connecticut, Pittsburgh, New York City, Philadelphia and surburban counties around the latter cities (R 1313). That Holmes did not consider itself bound by the 1906 agreement after its termination is demonstrated by its nearly completed acquisition, after the agreement terminated, of Newark District Telegraph Company, which was in the fire alarm business. And, that it was not the agreement that caused Holmes not to expand its territory is seen by the fact that Holmes, even during the period of the 1906-1947 agreement with ADT, did not go into Maryland, the District of Columbia, Delaware, New Jersey, Connecticut or much of the surburban New York and Philadelphia areas—not, obviously, because of the agreement which specifically permitted it to operate in those areas. And, further demonstration of the insubstantiality

of the government theory that Holmes violated the antitrust laws by not going into the fire alarm business after the 1947 termination of the agreement comes from the undeniable fact, that, from its founding in 1858 (by the sponsor of an electric burglar alarm), for the 48 years *preceding* the 1906 agreement, Holmes also did not go into the fire alarm business, which business involves different risks, different problems and different devices than the burglar alarm business.

In short, for the government to urge—as it does—that Holmes' not going into the fire alarm business after 1947 violates the antitrust laws does not reconcile with Holmes' not having gone into that business from 1858 to 1906, long before it heard of ADT or Grinnell. Beyond that, such contention is refuted by Holmes' effort to go into the fire alarm business by acquiring a company engaged in that business, which effort terminated on the advice of counsel in January, 1961, three months before the government brought this suit.*

And, apart from all that, there was here not the semblance of a fair trial. While the government seeks to explain that the district court's comments such as "my views are more extreme than those of the government" and "I just assure you it [questions and answers showing the reasonableness of activities alleged to be in restraint of trade] is a great ceremonial act, as far as I am concerned" and "This is an exercise in trying to persuade Congress or five Justices of the Supreme Court but it won't have the slightest effect on me"; "I do not believe it makes the slightest bit of difference what is being shown in this case by both sets of counsel * * * I am quite sure that in the long run the Supreme Court of the United States is going to take about as narrow a view of the market as the circumstances here permit" were, in context, not proof of bias or prejudice, the government brief nowhere points out how comments such as those, made throughout the

* The government statement (Brief, pp. 12, 97) that "each of these defendants" had an outstanding offer to purchase a non-defendant company at the time this suit was filed is unsupportable insofar as Holmes is concerned.

trial (see the Grinnell main brief), could not but have imparted an atmosphere of haste and hostility that unfairly and prejudicially affected defense counsel and their witnesses.

More than that, however, the government makes no effort to explain—as it cannot—how a district judge could render the impartial justice of which this Court should approve where his attitude was, as he himself put it during the trial (R 371): "an attitude of predicting how far out nine moveable men moving to the left will move" and when, as he himself indicated after the trial, he felt he need not even attempt to digest the evidence. As he wrote (R 744): "Few judges who have sat in such cases have attempted to digest the plethora of evidence, or indeed could do so and at the same time do justice to other litigation in their courts".

Beyond even that, however, the government brief nowhere explains how a district judge who, on the opening of the trial, tells defendants' counsel (R 366): "You yourself put on me the burden of forming an opinion *and I did form one*" (emphasis added) could thereafter be capable of giving the defendants the fair trial before an impartial trier of the facts that elementary due process demands.

In short, what the government brief does not tell us is telling demonstration that there has been a serious miscarriage of justice here requiring reversal of the decree and, because of the plainly erroneous market definition, dismissal of the complaint.

Nor is the additional relief now sought by the government justified. From what has already been said, no relief (or punishment) should be directed to Holmes.* What the

*The government, in seeking transfer of title to the protection devices on the subscribers' premises to the subscriber is particularly wrong and also inconsistent. On the one hand, the government asserts that protection services other than central station protection should be excluded from the relevant market because (p. 8) "the users of other types of service * * * may not properly maintain them" or (p. 55) "these other systems 'through neglect or through ignorance of the property owner * * * might deteriorate or not be functioning at the time it was probably needed' " and, on the other

government proposes on its appeal with respect to transferring title to that part of the protection equipment on subscribers' premises to the subscribers and with respect to mandating a one-year contract with subscribers and reporting its quotations of prices and terms of sale would serve only to make Holmes non-competitive and—as the district court found and as is undeniable—Holmes has competition wherever it does business (Finding 8, R 748; Stipulation 6, R 315-6; R 4507-8) and such competition is intense and increasing with Holmes' market share diminishing and its competitors concededly prospering (Findings 45, 48, R 756; Gov't Brief, p. 11, footnotes 6, 7; Stipulations 5, 6, R 2266-78, 313-6; R 212-7, 708, 723-4, 2216-27, 2540-1, 2545-6, 2657, 2682-3, 2689, 2728-9, 2732-4, 2842, 2844, 2849, 2852-3, 4477-9, 4507-8, 4605-13, 4629, 4631, 4669-70).

Conclusion

The judgment of the district court should be reversed and the complaint dismissed.

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hand, the government requests additional relief that would give to the very users it condemns as unreliable control over the maintenance of vital parts of Holmes' protection system.